IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 683.

CHRIS PAPALIOLIOS and CHARLES A. WATERS, HUGH REID, ERNEST A. SIMPSON, HORACE KITCHING, WILLIAM F. HAYWARD, WILLIAM SMALLWOOD, JAMES R. READDIE, CHARLES AUGENTHALER, JAMES W. MAXWELL, JOHN F. CAHALANE and JOHN D. KITCHING, doing business under the name and style of SIMPSON, SPENCE & YOUNG,

Petitioners,

v.

HARRY M. DURNING, as Collector of Customs of the Port of New York.

REPLY TO RESPONDENT'S BRIEF.

The respondent bases an important part of his argument on the proposition that bonds given in admiralty cases are for the full value of the vessel, whereas the bonds required under Section 20 of the Immigration Act of 1924 provides for bonds "with sufficient surety to secure the payment" of the amount of the claim. On page 11 of his brief he says of admiralty bonds: "When a sufficiently secure bond of the same value as the ship is submitted to the court, it substitutes the bond for the ship, and the suit continues as one against the bond which has become *res.*"

On page 12 he says: "Under section 20 the bond cannot become a substituted *res* of equal value for the ship because the ship is not liable for the fines."

These statements are completely in error. Normally, in the admiralty, the bonds taken are only for an amount adequate to cover the probable amount of the claim, usually fixed by stipulation or court order. This is prominently brought to notice in the case of *The Union*, Fed. Cas. No. 14346 (4 Blatch. 90. CC SD N. Y. 1857) and such has been the rule ever since. The only instances in which bonds are required equal to the value of the ship are those in which the amount of the claim or claims equal or exceed the value of the ship, and that also would be true of the bond required under Section 20.

The only difference between the two types of bond is that in the one case the bond is given to release the ship from a maritime lien created by statute and in the other to release her from what is, in effect, a possessory lien created by statute.

Furthermore, the cases with which it is urged the present decision is in conflict are not confined to decisions involving maritime liens. The cases cited in the application for the writ include also cases arising under the tariff and other laws providing for the confiscation of ships or their cargoes, in which the effect given to bonds for the release of ship or cargo was held to be the same as that insisted on in this action.

The statement in the last paragraph of page 10 of the respondent's brief is inaccurate. Many cases are cited in the application for the writ, and more could be added, showing that the Government resorted to actions on bonds given under Section 20 for the collection of fines thereby secured and in the case of *Bank Line Ltd.* v. *United States*, 96 F. (2d) 52, the Court expressed surprise that the plain-

tiff had not awaited suit on the bond instead of taking the initiative.

In the comparatively few cases in which the Collector has resorted to the device of withholding clearance a second time, practical reasons existed for not contesting the Collector's action because the amount involved usually was comparatively small and did not warrant the risk of loss by delaying the sailing of the ship. It cannot be said that there has been an undisputed practice of withholding clearance to ships after she has once been released under bond.

Finally, the argument commencing on page 8 of the respondent's brief is based on an inaccurate resume of the statute, where it is said "Its mandate is that 'No vessel shall be granted clearance' where either of two circumstances exists: (1) 'pending the determination of the liability to the payment of such fine' *and* (2) 'while the fine remains unpaid.' " (Italics supplied.)

What the statute actually provides is: "No vessel shall be granted clearance pending the determination of the liability to the payment of such fine, *or* while the fine remains unpaid". This is immediately followed by the words "except that clearance may be granted prior to the determination of such question upon the deposit * * * of a bond with sufficient surety to secure the payment thereof approved by the collector of customs. (Italics supplied.)

The implication of the statute seems to be clear that if the vessel remained until determination of liability had been determined, there would be no reason for releasing her from a fixed liability. But if she needed a release, it would be granted on the posting of the required bond which would, in itself, constitute a *res* out of which collection could be made. To accomplish this, however, it was necessary to post the bond before liability had been de-

termined. In this case, liability had not even been determined at the time the Collector denied the second clearance. It was in the process of being determined in the suit on the bond which had previously been instituted by the United States.

Respectfully submitted,

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By DELBERT M. TIBBETTS,
Counsel for Petitioners.

Dated: New York, May 24, 1951.